Supreme Court, U.S.
FILED

10-978 JAN 24 2011

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

and another action

JOHN SALVADOR, JR. and
KATHLEEN A. SALVADOR,
Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

MADELINE SHEILA GALVIN
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, New York 12054
(518) 439-7734
Attorneys for Petitioners

QUESTIONS PRESENTED

The two cases, *Lake George Park Commission* v *Salvadors, et al. and William Robinson*, Warren County Index No. 37573 and *Lake George Park Commission* v *Salvadors, et al.*, Warren County Index No. 45591, which are the subject of this Petition were decided as one by the New York State Court of Appeals in its Decision dated October 26, 2010, and were argued together before the New York State Appellate Division Third Department. Both actions involve with the same Petitioners (John Salvador, Jr., Kathleen A. Salvador and Dunham's Resort Corp.) and the same Respondent (Lake George Park Commission) and arise out of matters relating to a New York State Department of Environmental Conservation Department ("DEC") Marina Permit ("Permit") issued to Petitioners, subsequent changes in applicable permitting regulations and enforcement action, its *sequella*, application to Petitioners and resulting denial of Petitoners' constitutionally protected rights.[1]

Both cases involve the same Petitioners and the same Respondents. The underlying procedural history and facts include over 11 years of litigation between the parties. The procedural history is relevant to issues raised by Salvadors of violation

---

[1] Lake George Park Commission is referred to as the "Commission" and Salvador-related Defendants are collectively referred to as "Salvadors" with respect to both actions

of their Constitutional rights under the Due Process, Equal Protection and Takings Clause.

The Commission commenced #37573 in May, 2000, by Order to Show Cause and #45591 in 2004. In neither case were Salvadors given any trial on the merits. Both cases were disposed of summarily and much later set by the Court for "mitigation hearings".

The separate procedural frameworks are relevant. Index #37573 commenced in May, 2000, over time was assigned to three judges during its 10 years, ultimately to Justice Richard Aulisi. Index No. 45591, commenced in 2004 was assigned to Justice Aulisi both on motions and then for mitigation hearings. Both actions were decided on separate Summary Judgment motions against Salvadors and imposed fines and penalties totaling in excess of $689,000. Salvadors appealed. Appellate Division, Third Department, found against Salvadors, but reduced total fines and penalties to $538,577, based on the court's mathematical errors. Salvadors moved for permission to appeal to the New York Court of Appeals, or in the alternative to reargue, both were denied. Salvadors moved to the Court of Appeals for leave to appeal on grounds including Federal constitutional issues pre-served in both cases. The Court of Appeals denied the motion. State Courts refused to consider or address Constitutional issues.

Constitutional issues also go back to the decisions granting the Commission summary judgment in both cases against Salvadors, issues arising out of the mitigation hearings, and fines and penalties imposed. All issues were raised and preserved below. Salvadors were denied any hearing on the merits and Constitutional issues either administratively or in court.

Both actions, #37573 and #45591 were treated as if they were joined by the New York State Court of Appeals in its Decision dated October 26, 2010. Both actions are related and raise United States Constitutional issues properly raised and preserved below. Both deal with the same parties and overlap-ping issues, and based upon the treatment of the cases by the New York State Court of Appeals, and in the interest of judicial economy Salvadors seek consolidated *certiorari* as to both cases.

The Questions Presented by these cases are:

1. Were the Salvadors denied their constitutional rights including due process in both actions and was none of the error below harmless error?

2. Did the Commission violated laws, rules and regulations requiring it to obtain approval from the DEC Commissioner before seeking fines and penalties in excess of $5,000 and thereby render the fines and penalties

assessed against Salvadors an unconstitutional taking?

3. Was the taking of Salvadors' vested property rights without hearing unconstitutional in violation of the Fifth Amendment?

4. Did the "permitting" statutes and regulations as applied to Salvadors' created an impermissible burden and "class-of-one" and violate Salvadors Constitutional rights?

5. Did Commission action seek a transfer or reallocation of wealth violating Salvadors' Fifth Amendment rights which were preserved, but ignored?

6. Do the Constitutional principles at issue warrant review?

7. Did the act of the Commission and State Courts effect an unconstitutional exaction?

PARTIES TO PROCEEDINGS

In *Lake George Park Commission* v *Salvadors, et al. and William Robinson*, Warren County Index No. 37573 ("#37573") Petitioners are John Salvador, Jr. and Kathleen A. Salvador, individually and as owners, officers and managers of the Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc., d/b/a Dunham's Bay Boat and Beach Club, Inc., Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc. and/or Dunham's Bay Boat and Beach Club, Inc., here are Petitioners. Respondent here in the #37573 action is the Lake George Park Commission. William Robinson is not a party to this Petition.

In *Lake George Park Commission* v *Salvadors, et al.*, Warren County Index No. 45591 ("#45591"), John Salvador, Jr. and Kathleen A. Salvador, individually d/b/a Dunham's Bay Boat and d/b/a Dunham's Bay Boat and Beach Club, and d/b/a Dunham's Bay Lodge; and Dunham's Resort Corp., here are Petitioners and the Lake George Park Commission ("Commission") is the Respondent.

In both actions the Commission was the Plaintiff below and Appellee-Respondent in New York State Supreme Court Appellate Division Third Department and in the New York State Court of Appeals and Petitioners herein were Defendants and Appellants-Respondents on appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In #37573 the named Defendants included "Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc., d/b/a Dunham's Bay Boat and Beach Club, Inc., Dunham's Resort Corp., d/b/a Dunham's Bay Lodge, Inc. and/or Dunham's Bay Boat and Beach Club, Inc.". Of those named entities, only one, Dunham's Resort Corp. was an existing corporate entity and actual party. Dunham's Resort Corp. is a closely-held New York State Corporation having no parent or publically held company owning 10% or more of the corporation's stock. [Rule 29.6]

In #45591 the named Defendants included "d/b/a Dunham's Bay Boat and d/b/a Dunham's Bay Boat and Beach Club, and d/b/a Dunham's Bay Lodge; and Dunham's Resort Corp." Of those named entities, only one, Dunham's Resort Corp. was an existing corporate entity and actual party. Dunham's Resort Corp. is a closely-held New York State Corporation having no parent or publically held company owning 10% or more of the corporation's stock. [Rule 29.6]

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings v

Rule 29.6 Corporate Disclosure Statement vi

Jurisdiction 1

Relevant Statutory Provisions Involved 1

Statement of the Case 1

Point I:
Salvadors Were Denied Their Constitutional Rights Including Due Process Rights in Both Actions 5

Point II:
The Commission Violated Laws, Rules and Regulations Requiring it to Obtain Approval from the DEC Commissioner Before Seeking Fines and Penalties in Excess of $5,000 11

Point III:
The Unconstitutional Taking of Salvadors' Vested Property Rights Without Hearing Violates the Fifth Amendment. 13

Point IV:
"Permitting" Statutes and Regulations as Applied to Salvadors' Created an Impermissible Burden and a "Class-of-One" 18

Point V:
Commission Action Attempted a Transfer or Reallocation of Wealth Violating Salvadors' Fifth Amendment Rights Which Were Preserved, But Ignored 31

Point VI:
Constitutional Principles at Issue Warrant Review 39

Point VII:
Commission and State Court Action Effected an Unconstitutional Exaction 43

Conclusion 47

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. *Pena*,
515 U.S. 200, 115 S.Ct. 2097 (1995) 22
Agins v. *City of Tiburo*, 447 U.S. 255,
100 S.Ct. 2138 (1980) 44
Allegheny Pittsburgh Coal Co. v.
Commission of Webster Cty.,
448 U.S. 336, 109 S.Ct. 633 (1989). 30
Andrus v. *Allard*, 444 U.S. 51,
100 S.Ct. 318 (1979) 28
Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*,
281 U.S. 673, 50 S.Ct. 451 (1930). 31
Dolan v. *City of Tigard*, 512 U.S. 374,
114 S.Ct. 2309 (1994). 44
Engquist v. *Oregon Department of*
Agriculture, 553 U.S. 591,
128 S.Ct. 2146 (2008) 22, 23, 25, 29, 30
Forsyth County v. *Nationalist Movement*,
505 U.S. 123, 112 S.Ct. 2395 (1992) 26
Hayes v. *Missouri*, 120 U.S. 68,
7 S.Ct. 350 (1887). 24
Heart of Atlanta Motel, Inc. v. *Untied States*,
379 U.S. 241, 85 S.Ct. 348 (1964). 35
Kaiser Aetna v. *United States*,
444 U.S. 164, (1979) 35
Kimball Laundry Co. v. *United States*,
338 U.S. 1, 69 S.Ct. 1434 (1949) 18
Loretto v. *Teleprompter Manhattan CATV Corp.*,
458 U.S. 419, 102 S.Ct. 3164 (1982) 37
Lucas v. *South Carolina Costal Council*,
505 U.S. 1003, 112 S.Ct. 2886 (1992) 39

Metromedia, Inc v *San Diego*, 453 U.S. 490, 101 S.Ct. 2882 (1981) 45
Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U S. 687, 119 S.Ct. 1624 (1999). 38
Mugler v. *Kansas*, 123 U.S. 623, 8 S.Ct. 273 (1887). 18
Palazzolo v. *Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001) 37, 39, 44
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922). .35, 37, 43
PruneYard Shopping Center v. *Robins*, 447 U.S. 74, 100 S.Ct. 2035 (1980). 32
Raymond v. *Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct. 7 (1907). 22
Schneider v *State*, 308 U.S. 147, 60 S.Ct. 146 (1939) 45
Sioux City Bridge Co. v. *Dakota County*, 260 U.S. 441, 43 S.Ct. 190 (1923). 30
Sterling v. *Constantin*, 287 U.S. 378, 53 S.Ct. 190 (1932) 5
Stop the Beach Renourishment, Inc. v. *Florida Department of Environmental Protection*, 560 U.S.__ (2010) 17,31
Village of Willowbrook v. *Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000) 22, 23, 24, 30
Yee v. *City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992). 33, 34, 35, 36

Unreported Related State Case

Dunham's Bay Boat Co., Inc. v *Town of Queensbury*, Warren County Index # 33303 (unreported) . . . 26, Appendix

United States Constitution
Article I § 10 . . . . . 1, 14
First Amendment 1, 45
Fifth Amendment. 1, 13, 17, 31, 34, 39, 40, 44
Takings Clause. .17, 31, 33, 34, 36, 40, 37, 44
Fourteenth Amendments 1, 24, 45
Due Process Clause . . . 5, 7, 8, 11, 13, 14, 14
. . . . . 15, 16, 39, 43, 44
Equal Protection Clause . . . 13, 14, 22, 23, 24
. . . . . 30,40, 46

Statutes
Federal Statutes
28 U.S.C. §453. 24
28 U.S.C. §1257 1

New York State Statutes
Administrative Procedure Law
§102 14
§203 14
§204 14
§207 14
Civil Practice Law and Rules
§6313. 8
Environmental Conservation Law
ECL Article 43 11
§43-0105 11
§71-3303 . . . . . .11, 12
§71-3305. . . . . 11, 12
New York State Rules and Regulations
Department of Environment Conservation
Rules and Regulations
(6 NYCRR). 11, 13, 15, 17, 19, 20, 24
. . . . . 24,25,26,30, 33, 34, 35, 43

"Original" 6 NYCRR Part 646
Marina Regulations applicable
July 3, 1981 . . . . . 13, 14, 15, 17, 19, 20, 21
"New" 6 NYCRR Part 646 Regulations
applicable to Class A marinas
June 3, 1988 . . . . . 16, 14, 17, 18, 19,
. . . . . 24, 25, 26, 32, 35, 43

Other Material
Lake George Park Commission
Minutes, April 29, 1998, Minutes 21
Minutes, September 29, 1998,
Minutes 1, 25, 26,
Official Dock Survey Report, Contract,
June 24, 1988 . . . . . 41, 42
Resolution No. 98-69 . . . . . 1, 26, 34
Resolution August 25, 19987, ... 26
Notice to Up-date Marina Permit,
June 24, 1996 21

APPENDIX
Decisions in These Cases
Index #37573
Appellate Case # 506034

New York State Court of Appeals
October 26, 2010 1
State of New York Supreme Court
Appellate Division, Third Department
Decision and Order on Motion
Decided and Entered: June 28, 2010 2
State of New York Supreme Court
Appellate Division, Th d Department
Notice of Entry April 9, 2010 4

State of New York Supreme Court
Appellate Division, Third Department
Memorandum and Order
Decided and Entered: April 8, 2010 6
State of New York Supreme Court
Appellate Division, Third Department
Notice of Entry February 18, 2009 14
State of New York Supreme Court
Appellate Division, Third Department
Decision and Order on Motion
Decided and Entered: February 17, 2009 16
State of New York Supreme Court
County of Warren Index # 37573
Notice of Entry December 15, 2008. 18
State of New York Supreme Court
County of Warren Index # 37573
Judgment Entered December 4, 2008 20
State of New York Supreme Court
County of Warren Index # 37573
Decision and Order October 10, 2008 22
State of New York Supreme Court
Warren County Index # 37573
Decision July 19, 2004 94
Warren County Index #45591
Appellate Case # 507817

New York State Court of Appeals
October 26, 2010 1
State of New York Supreme Court
Appellate Division, Third Department
Decision and Order on Motion
Decided and Entered: June 28, 2010 31

State of New York Supreme Court
Appellate Division, Third Department
Notice of Entry April 9, 2010 33
State of New York Supreme Court
Appellate Division, Third Department
Memorandum and Order
Decided and Entered: April 8, 2010 35
State of New York Supreme Court
Appellate Division, Third Department
Notice of Entry February 18, 2009 14
State of New York Supreme Court
Appellate Division, Third Department
Decision and Order on Motion
Decided and Entered: February 17, 2009 46
State of New York Supreme Court
County of Warren Index # 37573
Notice of Entry December 15, 2008. 47
State of New York Supreme Court
County of Warren Index # 37573
Judgment Entered December 4, 2008 49
State of New York Supreme Court
County of Warren Index # 37573
Decision and Order October 10, 2008 51

Excerpts from Records Below

RECORD-APPENDIX

Record #37573, Michael White Testimony
at 4709-4711, Exhibit-39 62
Record #37573, 4690-4693, Exhibit 39 56
Record #37573, 4697-4701, Exhibit-39 57
Record #37573, 4702-4704, Exhibit-39 60
Record in #37573, John Salvador, Jr.
Testimony at 5505-5508 64

Current Official Compilation of Codes, Rules, and Regulations of the State of New York Title 6: Department of Environmental Conservation 67

Subpart 646.
Substantive Regulations 67
Subpart 646.1
Docks, Wharfs, Moorings and Marinas 67
Subpart 646.12
Docks, Wharfs, Moorings and Marinas 68
Subpart 646-1.4
Docks, Wharfs, Moorings and Marinas 72
Subpart 646-1.5
Docks, Wharfs, Moorings and Marinas 79
Subpart 646-1.6
Docks, Wharfs, Moorings and Marinas 80
Subpart 646-1.7
Docks, Wharfs, Moorings and Marinas 83

New York State Law Environmental Conservation Law 84

§ 71-3303 84

§ 71-3305 85

§ 71-3307 86

United States Constitution Provisions . . .87

Article 1 § 10 87

Amendment I 88

Amendment 5 88

14th Amendment 88

Federal Statutes 89

§ 453
Oaths of Justices and Judges 89

28 U.S.C. § 1257.
State Courts; Certiorari 89

Resolution No. 98-69 90

Marina Permit
Marina Permit DEC
Permit #50-81-0071 MA 103

Commission Reports and Contracts
June 24, 1988, Commission Official Dock Survey
Report Contract 107

JURISDICTION

Subject matter jurisdiction for this Court is found in 28 U.S.C. §1257. The New York State Court of Appeals decided both cases which are the subject of this Petition as one by summary Decision dated October 26, 2010. Both cases arise out of violation of Salvadors' Constitutional rights by the Commission and New York State Courts under Article I § 10, and the First, Fifth and Fourteenth Amendments of the United States Constitution.

RELEVANT STATUTORY PROVISIONS INVOLVED

United States Constitution
Article I § 10; Amendments I, V, XIV

STATEMENT OF THE CASE

September 29, 1998, by Resolution No. 98-69 the Commission unilaterally, without notice and without hearing stated it "Revoked" a Marina Permit[1] ("Permit") previously issued to Salvadors by the DEC, the Commission's parent agency. Thus began the slide down the slippery-slope of Constitutional violations and taking Salvadors' property rights.

The lower court improperly granted Commission motions for summary judgment in both #37573 and #45591. Despite Salvadors' timely

---

[1] DEC Permit # 50-81-0071 MA issued Salvadors March 22, 1982, based on Application to DEC dated November 14, 1981.

proper request for discovery prior to the Court granting the motions, Salvadors were not allowed discovery in either case, denying Salvadors access to evidence in the Commission or its parent entity the State Department of Environmental Conservation's ("DEC") possession and control. Salvadors were denied any due process trial or hearing on the merits and underlying issues in either #37573 or #45591.

Any record only developed because Salvadors' continued efforts to obtain any discovery devolved into the "mitigation hearings". Discovery was limited in both cases to matters the Commission and Court deemed related to "mitigation", and was not allowed until after summary judgment was granted, depriving Salvadors of any hearing on the merits. Evidence allowed only went to mitigation of the amount of fines and penalties to be assessed, severely restricting discovery and limiting testimony.

Salvadors raised Constitutional issues from beginning of #37573, starting with failure to hold the statutorily required hearing on the Temporary Restraining Order ("TRO") granted the Commission. Each issue of deprivation of Salvadors' Constitutional rights was raised and preserved below.

In #45591, Salvadors raised Constitutional issues beginning with submissions in opposition to summary judgment, which they repeated and preserved at each stage.

In both cases the Commission failed to follow its statutory and procedural requirements, including failing to obtain required approval of the DEC Commissioner prior to seeking fines in excess of $5,000. The amount of the confiscatory fines State Court assessed against Salvadors of over $689,000, without any trial or hearing on the merits, moved Commission actions from civil into confiscatory criminal penalties.

State Courts refused to hear Salvadors' arguments determining Salvadors had not exhausted administrative remedies and were not yet entitled to relief in a judicial forum. When Salvadors attempted to exhaust administrative remedies, making application to the Commission for relief, they were stymied by its refusal to consider any Salvador submissions, from which Salvadors had no appeal or recourse. No administrative remedy existed, trapping them in a vicious circle, chasing from one bureaucracy to the next, told a permit from another bureaucracy was required before the Commission would consider any application. With no mechanism to "force" consideration, since the matter was subject to no set time limitation and was not appropriate for mandamus, Salvadors were in a procedural quandary. The Commission only considered Salvadors' Permit application when State Court acted with a directive resulting in the Commission granting Salvadors a Class A Marina Permit ("Commission Permit") in essentially the form Salvadors submitted starting in June 1996, and was before the Commission in 1998, but excluding

Salvadors' preexisting 6-foot dock extensions and handicap access facility. The Commission stated it would not consider those items unless Salvadors made separate application for each, after first removing them and, even then, would not look favorably on such applications. Salvadors removed the 6-foot extensions as Court ordered. The Court did not order Salvadors to remove the handicap facility. Salvadors did as required; they applied to the Commission following legally prescribed procedures. Their applications languish in the Commission's "dead letter" department. Salvadors could not proceed to Court to move the applications, since they could not exhaust administrative remedies because the Commission refused to consider their applications, meaning they are not "turned down". Non-determinations are not appealable. The result is regulatory taking of Salvadors' property rights and marina operation without compensation.

None of the Constitutional violations which have occurred in theses cases can be classified as harmless error. Each is a substantial substantive violation of Constitutionally protected rights. No Court has addressed any Constitutional issues raised, each of which was preserved at every step of the proceedings.

POINT I
SALVADORS WERE DENIED THEIR CONSTITUTIONAL RIGHTS INCLUDING DUE PROCESS RIGHTS IN BOTH ACTIONS

The Commission's exertion of state power overrode Salvadors' private rights secured by the Constitution. Failure of State Courts to address these issues ignores the paramount authority of the Federal Constitution. *Sterling* v. *Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190 (1932).

Before the Court granted the Commission's summary judgment motions, Salvadors made numerous requests to the Court for discovery, including for judicial subpoena *duces tecum* in both actions, none of which were approved before grant of summary judgment. The subpoenas were for State and local government employees, which in New York State require judicial subpoenas to compel testimony and record production.

Salvadors repeatedly requested hearing on the merits in both cases before the Commission moved for summary judgment. None was allowed. For example in #37573 Salvadors requested a merits hearing from the outset both in writing and verbally, requests were either the Court denied or ignored without decision, systematically denying Salvadors discovery, and affirmatively denying their right to judicial hearings from the outset, even on the original Order to Show Cause. Justice Moynihan held a preliminary hearing on the TRO May 19, 2000, and scheduled a full Hearing on the

Order to Show Cause for June 12, 2000. May 24, 2000, immediately on receipt of the signed Order to Show Cause, Salvadors, hand delivered request for judicial subpoenas to Justice Moynihan for the June 12, 2000, hearing seeking State and local officials testimony and documents production, crucial to Salvadors' defense.

May 26, 2000, Justice Moynihan allowed the Commission to move to quash the unendorsed subpoenas, gave Salvadors until June 5, 2000, to respond, and made the motion returnable June 6, 2000. Salvadors timely responded and by letter requested adjournment of the hearing from June 12, 2000, to allow time to act on any decision on the motion to quash, either to serve subpoenas or appeal if subpoenas were denied. That request has yet to be granted or denied, the Court did nothing.

The Court did not respond either way to Salvadors' adjournment request; therefore, June 12, 2000, Salvadors appeared ready to proceed to hearing, without the requested judicial subpoenas. No one else appeared. The June 12, 2000, hearing did not take place. Justice Moynihan did not reschedule the hearing; the TRO remained in place. Salvadors continued to honor and adhere to the TRO terms.

On June 13, 2000, Salvadors timely filed and served a Sur-Reply Memorandum of Law addressing new issues the Commission raised in response to Salvadors' June 5, 2011, Reply. The further Commission response was not authorized in

the scheduling order. June 27, 2000, Justice Moynihan recused himself. July 7, 2000, after no Court notice about reassignment of the case, Salvadors contacted the Court requesting notice of to whom case was assigned. New York Unified Court System *eCourts* for #37573, shows the original motion filed May 5, 2000, transferred from Justice Moynihan July 10, 2000, to Justice Edward Sheridan who held a conference September 8, 2000, where Salvadors requested action on the judicial subpoenas and prompt scheduling of hearing on the TRO. Salvadors complained about delay addressing the TRO which remained in place without the evidentiary hearing they repeatedly requested. The case was stagnant until reassigned to Justice Richard Aulisi January 2, 2001.

Between September 8, 2000, and June 6, 2001, the first appearance before Justice Aulisi, nothing happened. The Court failed to address Salvadors' request for a hearing on the TRO required under State Law. Salvadors made only one request for adjournment of the hearing date, noted above, which never was granted or denied. Salvadors never were given any hearing on the original TRO, but it remained in force severely interfering with their property use. No Judge assigned #37573 ever signed subpoenas, denied Salvadors' request for subpoenas, granted or denied the Commission motion to quash.

Salvadors were entitled to a Due Process Hearing on the merits before any proceeding on fines and penalties. Before the Commission

proceeded against Salvadors in #37573, on August 28, 1999, Salvadors requested in writing a full Commission Hearing on those same issues. It was followed by a number of verbal and requests in the litigation on the record, and in writing, answered at least once by Justice Aulisi, who stated the issue was solely within the Commission's administrative discretion.

Despite Salvadors' frequent requests for hearing on #37573's Order to Show Cause was severely over-due, they were ignored. (*e.g* December 17, 2003 Letter to Justice Aulisi) In 2002, Salvadors reminded Justice Aulisi CPLR §6313 requires "Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time." Salvadors neither waived nor neglected to pursue their statutory right to hearing on the preliminary injunction.

Without any evidentiary hearing on underlying TRO issues or on any "merits" issues in #37573, the Commission moved for summary judgment. Salvadors opposed it, raising and preserving denial of their right to a hearing and to discovery. Summary judgment in #37573 was granted without Salvadors having due process opportunity to confront witnesses against them and denied their due process right to seek evidence in the Commission and its parent entity DEC's possession and control necessary to defeat summary judgment.

The only "hearings" Salvadors ever had on any issues were two "mitigation" hearings, where issues Salvadors were allowed to address were severely limited by the narrow scope "mitigation". The following exchange took place during John Salvador's testimony in #37573's mitigation hearing:

> Q. . . .[A]fter you learned that the Park Commission had a problem with your six-foot dock extensions, did you do anything to attempt to remedy it?
>
> . . . . . .
>
> A. What we tried to do was to show the Commission when the dock extensions were put in place and the permits under which we were working at the time, the permits that were in effect. .
>
> . . . . . .
>
> Ms. Galvin: It is our. . .[contention] that it has never been thoroughly litigated . . . .[the #45591 mitigation hearing] and this particular hearing are the first opportunities that Mr. Salvador has had to obtain any evidence in the possession of the Park Commission, to have witnesses and to be able to determine. . . . On the order to show cause, I put in numerous subpoena. . . because I needed judicial subpoenas. . .from Judge Moynihan . . . . [for] Commission people compelled to come with their records. If we had had those at that time, I sincerely

> doubt if we would be sitting here today. It would have been resolved.
>
> . . . . . .
>
> . . .[T]his has been the first opportunity we've had to cross-examine any witnesses to get the document[s]. . :we could not defend when we weren't given a hearing. The Court: I understand that but the issue we're dealing with before me is mitigation, amount of penalties, if any, and/or mitigation. I don't need- -I have been involved now with these cases, these Salvador cases for several years. . . . I think he would have put his full efforts into whatever it was, knowing him as I do.
>
> The question is just give me a general, a general statement. I understand where you're going with this but honestly, I'm familiar with it. I think the Appellate Division is familiar with it so whoever has to pass on all of this understands and I think you're just cluttering the record and it's not necessary. I understand his rationale and I'm saying that on the record, I'm giving it to you. I understand his rationale. . . . Appendix.

Salvadors were allowed two pre-mitigation hearing depositions, Michael White and William

Robinson and restricted document discovery, severely limiting the record, denying Salvadors' Constitutional rights. Procedures in both cases remained civil despite the confiscatory fines of over $689,000.00, which moved Commission actions from civil to criminal in nature.

Salvadors endure Commission's continual regulatory snatching remnants of their original "bundle" of rights. Commission arbitrary procedures prevented Salvadors from receiving any Due Process Hearing with cross-examine witnesses against them after discovery. Salvadors were found guilty without trial, without the most basic opportunity to be heard on the merits of either case. That simply is unconstitutional.

POINT II
THE COMMISSION VIOLATED LAWS, RULES AND REGULATIONS REQUIRING IT TO OBTAIN APPROVAL FROM THE DEC COMMISSIONER BEFORE SEEKING FINES AND PENALTIES IN EXCESS OF $5,000

The Commission has been part of DEC since its inception. In the 1980's while its administrative authority expanded it was not unlimited, continuing under DEC. Environmental Conservation Law ("ECL") §43-0105 established power or authority given the Commission derived from its status within DEC; it is subservient to DEC's Chief Administrative Officer, the Commissioner. ECL §71-3303. Civil and administrative sanctions and ECL §71-3305

Administrative procedures properly are read together.

ECL §71-3303 provides for civil penalties for violation of provisions of ECL Article 43 not to exceed $500 per day in violation, which may be assessed by the Commission after:

> . . .opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the. . . commission. . . .opportunity to be heard, or by the court in any action or proceeding initiated by the attorney general in the name of the. . . commission. . . . Appendix.

The requirement for "opportunity to be heard" and "by the court" are not mutually exclusive. The fact the Commission proceeded against Salvadors in Court, legally did not remove Salvadors' right for their "opportunity to be heard", although that is what in fact occurred.

The caption of §71-3303 states it relates to civil and administrative *sanctions*, penalties and fines; §71-3305 relates to *procedures*. These sections are compatible. Language of §71-3305 does not limit or restrict it to application within that section alone; rather, it states "All proceedings where the administrative penalties sought by the . . .commission exceeds five thousand dollars, shall be referred to the commissioner for processing. . . ." Appendix. It applies to all §71-3303 penalties, civil and administrative sanctions. The Commission

admitted it did not satisfy the mandate of these provisions. It ignored the law in proceeding against Salvadors.

The statutes state any fines sought by DEC apply to the Commission and require Commissioner's express approval to proceed. The Commission conceded it never obtained Commissioner approval. Failure to satisfy this statutory requirement cannot be and was not waived. Failure to satisfy it is uncontroverted proof Salvador's Due Process and Equal Protection rights were denied. Fines or penalties founded on the proceedings below violate Salvadros' Constitutional rights mandating reversal.

POINT III
THE UNCONSTITUTIONAL TAKING OF SALVADORS' VESTED PROPERTY RIGHTS WITHOUT HEARING VIOLATES THE FIFTH AMENDMENT

Identified rules or regulations for issuance of marina permits effective after July 3, 1988, were "repealed". That did not retroactively "cancel" or obliterate the prior issued Salvadors' DEC-issued Permit, issued prior to the effective date of supersession[2] or repeal of the regulations. To rescind, terminate or end a permit, the Commission had to proceed under applicable laws, rules and regulations, affording Salvadors, legitimate DEC

---

[2] *Black's Law Dictionary*: "supercedes annul, make void, or repeal by taking the place of".

Permit holders, Due Process and Equal Protection, including a "Revocation" Hearing. Declaring their Permit no longer existed was procedurally, legally and Constitutionally a nullity or "voidable" act, violating Salvadors' basic Due Process rights. (New York Administrative Procedure Law §§102, 203, 204, 207. Appendix)

Commission arguments on this point produce two conflicting outcomes; either:1)"Superseding" would make preexisting identified impacted provisions unenforceable *in futuro* for new applicants without DEC-issued permits, but would not void prior DEC-issued permits and preexisting DEC Permits would not required to be "reissued", "confirmed" or "adopted" by the Commission as DEC's successor marina permit issuer; or 2) Language of "supercession" voided all preexisting identified provisions rendering all action under prior regulations void, retroactively, without notice or hearing, revoking vested rights granted by DEC to all those relying on DEC-issued Permits, not just Salvadors.

Commission interpretation is inconsistent with logical application both in legal context and ordinary usage. Commission "revocation" of Salvadors' DEC Permit which predated the statute's effective July 3, 1988, was a nullity, an unconstitutional taking of Salvadors' vested property right without Due Process, without compensation and Constitutionally prohibited. Commission attempted revocation was defective *ab initio*, rendering all proceedings, fines and

penalties assessed as flowing from Salvadors alleged operation without a Permit, irreparably tainted by unconstitutional process.

Article I §10 of the Constitution prohibits States from passing any *ex post facto* law or law impairing contracts. Appendix. The Commission violated this Constitutional mandate in application of a statute retroactively altering the terms of an existing permit and then using that statute to "revoke" Salvadors' preexisting DEC Permit without a hearing.

Michael White, DEC employee-Commission Secretary and later Commission Executive Director, detailed the permitting process:

Q. . . .[F]rom June 3rd, 1988 until the Commission got around to. . .Joe's Marina [which] had been permitted by the DEC under prior regs, would Joe's Marina have been deemed by the Commission after June 3, 1988 to be unpermitted? . . . .

A. Well, it would be deemed unpermitted, but it would not be subject to enforcement.

. . . . . .

A. Well, we would hold that it only fair that facilities that were lawfully existing, subject to new permit requirements and standards, be afforded notice and an opportunity to apply before being subject to enforcement.

. . . . . .

Q. Between January 1,1988 and June 3rd, 1988, what was the status of the marinas that held DEC permits?

. . . . . .

Q. Were they permitted?

A. Well, I don't know exactly how you--that might require interpretation. But I do know that the responsibility to administer the regulations was transferred by legislation to the Commission.

. . . . . .

A. Of the original, what we've been referring to as the original 646 regulations. Nothing--those

> regulations continued to exist. They had not been repealed. So certainly, the Commission took no enforcement action against people for not having a permit during that period. Appendix.

White revisited his testimony on the process, expanding it with additional details:

> Q. . . .[H]ow would someone who had docks. . .or wharfs on Lake George, know that they were considered by the DEC to be a marina as of July 3rd, 1981?
>
> A. They might read about it in the newspaper, let's say, or receive notice.
>
> Q. . . .[H]ow someone would know that they had to register or request a permit as a marina. You indicated. . . some people would receive notice. Who was that notice from?
>
> A. Well, it would have been from the DEC. Appendix.

Stop the Beach Renourishment, Inc. v. *Florida Department of Environmental Protection*, 560 U.S. __ (2010), addressed Fifth Amendment Takings violations, finding the State barred from taking property without compensation and that all branches of State government can be the instruments of takings, including courts. Acquiescence of State Courts to the Commission disregarding Salvadors' Constitutional guarantees

and basic procedural requirements resulted in taking Salvadors' property rights without Due Process. Takings include State Courts subjecting Salvadors to confiscatory fines without trial on guilt or innocence on underlying accusations, adding another level of takings on top of already unconstitutional "revocation" of Salvadors' preexisting DEC Permit. By assessing fines and penalties for Salvadors' alleged failure to have a Permit which it impermissibly "revoked", the Commission raised fines and penalties to a level of seizure and effective criminal sanction. None of the Commission's or State Courts' steps pass Constitutional scrutiny. Salvadors' Constitutional arguments were raised and preserved below but ignored.

POINT IV
"PERMITTING" STATUTES AND REGULATIONS AS APPLIED TO SALVADORS' CREATED AN IMPERMISSIBLE BURDEN AND A "CLASS-OF-ONE"

Kimball Laundry Co. v. *United States,* 338 U.S. 1, 69 S.Ct. 1434 (1949), this Court reviewed States' restrictions on private property, stating such limitations are ". . .properly treated as part of the burden of common citizenship", *Id,* 5, and noted in *Mugler* v. *Kansas,* 123 U.S. 623, 665, 8 S.Ct. 273(1887), ". . .all property in this country is held under the implied obligation that the owner's use shall not be injurious to the community." Salvadors' operation created no potential harm to the community. Salvadors did not exceed what

DEC and the Commission had allowed them. Even the handicapped access as approved by DEC, Town and County was far less environmentally invasive than Commission-permitted expansion allowed others similarly situated. Salvadors' 6-foot dock extensions qualified for "grandfathering" more legitimately than Commission-grandfathered extensions of similarly situated competing marinas.

White explained differences between what he called the "original" Part 646 and the "new" Part 646:

> A. I meant the 646 regulations that were promulgated by DEC on July 3rd, 1981.
>
> . . . . . .
>
> A. The current 646 regulations of the commission were repealed and supplanted.
>
> . . . . . .
>
> The Witness: The original DEC 646 regulations.
>
> Q. . . . [A]s of today, DEC has no regulations that relate to Lake George under 646?
>
> A. No.
>
> Q. Included in 646?
>
> A. That's right. The 646 subpart is now exclusively regulations of the. . . Commission.
>
> . . . . . .
>
> Q. After January 1st, 1988, were there any provisions of 646 of the DEC

regulations that were continued by the Commission . . .--from the July 3rd, 1981 DEC regs?

. . . . . .

A. I don't know.

. . . . . .

Q. . . .[A] permit going forward, would that be a permit that would have been issued to wipe out the prior non-compliance?

A. No. . . . [W]hen talking about regulations that deal with ongoing permit requirements, in order to afford the parties who had rectified the violation through some means, the opportunity then to obtain the permits that they would be required to have, . . .they would be able to apply for a permit going forward.

Q. And does the process you just described continue in essentially the same form today, or has that changed under the Commission?

A. It continues in essentially the same form.

. . . . . .

A. The. . .Commission would have been substituted for DEC. But they would be similar, those procedures. Appendix.

If the Commission's Executive Director did not know what regulations applied and when, how could an applicant be expected to determine what

applied and when? White failed to explain how a marina permitted by DEC would know the permitting system changed. But White also testified:

> Q. After January 1st,1988, did the Commission issue marina permits to marinas. . .which had been in existence but had not been permitted under the July 3,1981, DEC regs?
>
> . . . . . .
>
> A. Yes.
> Q. And how long did that continue?
> A. It continues till today. Appendix.

From even before adoption of the 1981 regulations, Salvadors complied with DEC regulations for Marinas. The first "Notice" Salvadors received was a June 24, 1996, Commission letter with "Notice to Update Marina Permit". Salvadors responded July 22, 1996, within the required 30 days. At the Commission's April 29, 1998, meeting, Salvadors attempted to withdraw their pending Permit application after Commission counsel Martin Auffredou stated it should require John and Kathleen Salvador be named individually on any permit so their personal assets would be reached, beyond the corporate applicant's assets when, not if, the Commission moved against Salvadors. Auffredou stated, when ". . .there are problems down the road" in which the Commission, ". . . has to get involved with somebody for an enforcement matter or litigated matter. . . the landowner name has to be included.

Appendix. A Commission member stated other similarly situated corporate applicants were treated that way, ". . .[W]e just issued one to the Flamingo Restaurant [*sic.* Resort] on Lake George, and we didn't require George Pestinak's name. Is there any, what's the difference between. . . ." Appendix. Auffredou also clearly stated Salvadors should not be allowed to withdraw their application.

In *Engquist* v. *Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), a public employee sought Equal Protection Clause protections through application of class-of-one. This Court held plaintiff did not fall into that category, but set forth basic principles of equal protection relevant here. ". . . [T]he Equal Protection Clause 'protect[s] persons, not groups,' *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097(1995). . .and that the Clause's protections apply to administrative as well as legislative acts, see, *e.g.*, *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 35-36(1907)." *Id.*, at 595-596. The Commission placed Salvador in an Equal Protection Clause classic "class-of-one" several time and did so on public record.

Village of Willowbrook v. *Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000), cited in *Engquist* is in point to Commission handling Salvador's' application which was the causative factor of the initial enforcement action, which in turn was magnified by lower Court denying Salvadors any hearing on underlying merits, facts and allegations.

The Commission followed the course set by Auffredou. Salvadors were "presumed guilty", intended from the outset to be "found guilty" and punished however the Commission determined. Olech, a property owner in the Village, claimed she was irrationally singled out as a so-called "class of one". Olech requested:

> . . .to connect her property to the municipal water supply. Although the village had required only a 15-foot easement from other property owners. . .the village conditioned Olech's connection on a grant of a 33-foot easement. Olech sued the village claiming that the village's requirement of an easement 18 feet longer than the norm violated the Equal Protection Clause. . . .[W]e held that her complaint stated a valid claim under the Equal Protection Clause because it alleged that she had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S., at 564. . . . *Engquist,* 533 U.S. at 600.

Continuing in *Engquist:*

> . . .[*Olech*] involved the government's regulation of property. . . . [C]ases upon which the Court in *Olech* relied concerned property assessment and taxation schemes. . . .We expect such legislative or regulatory classifications to apply "without respect to

> persons," to borrow a phrase from the judicial oath. See 28 U.S.C. §453. . . .[T]he Fourteenth Amendment "requires that all persons subjected to. . .legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri,* 120 U.S. 68, 71-72 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to the legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Olech,* 528 U.S., at 564. *Id.*, at 600-601.

The Commission, using circular reasoning, "double-dipped" fines and penalties against Salvadors. It argued they had no Permit, the DEC-issued Permit was a "nullity". About the same facility and the same docks, the Commission argued the 6-foot extensions were illegal, un-permitted extensions of docks it then claimed were "permitted" by DEC. The Commission argued Salvadors failed to timely pay Commission-assessed fees for their Marina and docks "permitted" by DEC Permit, which the

Commission "honored" when it billed and collected payments for Salvadors' permitted docks. The Commission pursued "floating docks" a/k/a barges, arguing they expanded dock area authorized under Salvadors' DEC Permit, the one it said was a "nullity". Logically viewed, there can be no "rational basis" for the Commission's actions.

The Commission first found Salvadors could not withdraw their application, then decided they had withdrawn it, but proceeded to act on it, scheduling the "withdrawn" application for its September 29, 1998, meeting. There the Commission determined Salvadors were prohibited from withdrawing their application. If that seems confusing, it is far clearer retrospectively than as events unfolded. Salvadors continued discussions with the Commission attempting to resolve differences, requesting it delay final action on the application they were prohibited from withdrawing, until these issues were resolved. Salvadors met all requirements and filings dictated by the DEC and Commission, including when they changed dramatically without explanation or notice.

Commission methods dealing with Salvadors' application denied Salvadors' right to a hearing or even record on which to seek relief. Commission "findings", effectively were determinations, but communicated by staff, without following Commission procedures. It exceeded its authority issuing a "declaratory ruling" on its rules and statutes within the scope of enforcement. The Commission acted on Salvadors' withdrawn

application September 29, 1998, adopting Resolution No. 98-69[3] acknowledging the DEC-issued Permit, but finding, ". . .[T]he NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988. . . ." Appendix.

It did not explain "superseding" Salvadors' DEC Permit, nor claim notice to Salvadors of "suspension" or elimination of their preexisting vested rights. It ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity. . .[forming] the basis of a [Commission] Class A marina permit. . . .", but not that Salvadors' DEC permit allowed them to operate as legally authorized. Appendix.

Forsyth County v. *Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395 (1992), found an enactment facially violated the Constitution giving a county administrator broad discretion setting fees for permits, but failing to provide standards for the determination. The regulations here fail to provide procedures for this situation where the Commission refused to consider an application or how to handle a withdrawn application. This Court stated,"Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. . . ." *Id.*, 130. Those dangers are inherent

---

[3] August 25, 1998, the Commission resolved, ". . .the Commission denies the applicant's [Salvadors'] request to withdraw the application. . . ." Appendix.

here. The "bundle" of rights this Court held flows from property ownership is subject to systematic diminution "strand" by "strand". The way statute, rules and regulations were applied to Salvadors tainted any resulting determination. Even if the underlying statute withstood Constitutional scrutiny, lack of palpable standards, guidelines, minimum requirements for situations like Salvadors', renders that portion of the regulatory scheme Constitutionally invalid. Looking within the four corners of the regulations, how application to Salvadors would impact them or how their "bundle" of property ownership rights is thereby diminished cannot be determined. Facially the restrictions these regulations impose on Salvadors' rights cannot be determined. They fail to establish required protections necessary to avoid Constitutional infringement and fail Constitutional scrutiny.

Laws, rules and regulations should not have requirements which compel parsing to determine restrictions on property owners rights. Commission regulations fail to provide Constitutionally required safeguards and protections in the application process it created. The broad, essentially undefined range of purported standards for application and interpretation of Commission rules and regulations lets the Commission "adjust" them to suit the situation, depending on whose property "ox" the Commission intends to "gore". Salvadors' property rights were the "ox" in Commission sights. The

record includes many examples[4] of Commission "goring" Salvadors' rights, tailoring application of rules and regulations to exact the maximum from Salvadors without rational basis.

The unique location of Salvadors' docks on land inundated by the floodwaters of Lake George caused by State-approved artificial change of the Lake level in the early 1900s, gave rise to another "class-of-one" violation. Salvadors' docks are on Salvador-owned private property, not State-owned land. Other Lake George marina docks are on State-owned land, not private property. The Commission and Courts ignored this legally significant vested property right.

In *Andrus* v. *Allard,* 444 U.S. 51, 100 S.Ct. 318 (1979), this Court established ownership of property brought with it to the owner a "bundle of rights":

---

[4] Commission and Courts deny Salvadors use of the handicap access facility constructed on notice to the Commission, meeting legal requirements, receiving necessary governmental approvals, including DEC's, for construction, another example of impermissible "class-of-one" treatment and property rights taking. The issue, facility expansion, was litigated, decided in Salvadors' favor by an un-appealed State Supreme Court decision, holding it was not an expansion of Salvadors' marina: "This court does not find the grant of approval will result in any increase in use or change of use than what is already permitted." The Commission continues to refuse considering "permitting" its use. *Dunham's Bay Boat Co., Inc.* v *Town of Queensbury*, Warren County Index # 33303. Appendix

> . . .where an owner possesses a full "bundle" of property rights, the destruct-ion of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. *Id.*, at 65-66.

Salvadors cases establish systematic diminution of their property owners' "bundle" rights, "strand" by individual "strand". The State Court of Appeals' failure to acknowledge the Constitutional issues created another for erosion. Salvadors' "bundle" has been hacked down to a handful of "twigs" by the Commission, State Court failure to address Constitutional deprivation issues here reduced the "twigs" to "straws". The few remaining "straws" deserve protection and demand at least a hearing, before they vanish, like flash paper in a puff of smoke.

Engquist pinpointed problems Salvadors faced. The Commission claims clear standards by which those similarly situated to Salvadors were to be "judged" by the Commission existed, defined standards, for granting a Commission Permit, for determining status of a marina holding a DEC Permit and even who or what entity the Commission would accept as applicant. On each of these the Commission and Courts departed from the established norm in Salvadors' treatment. This Court stated:

> . . .[S]ignificant in *Olech*. . .was the existence of a clear standard against which

> departures, even for a single plaintiff, could be readily assessed. . . .[T]he complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it. *Engquist*, 533 U.S. at 601.

In *Engquist*, a public employment case, a class-of-one did not apply, but this Court acknowledged the class-of-one principle applicable here. Salvadors' case falls squarely within the parameters this Court set for such treatment.

> In *Allegheny Pittsburgh*. . . .[T]here was no suggestion that the "dramatic differences in valuation" for similar property parcels. . .were based on subjective considerations of the sort on which appraisers often rely, see *id.*, at 338-342, 345. *Sioux City Bridge*. . . recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties. *Id.*, at 601-602.

Salvadors' treatment placed them in a class-of-one where they were denied Equal Protection.

POINT V
COMMISSION ACTION ATTEMPTED A TRANSFER OR REALLOCATION OF WEALTH VIOLATING SALVADORS' FIFTH AMENDMENT RIGHTS WHICH WERE PRESERVED, BUT IGNORED

There was no judicial review of preserved Constitutional and Takings issues.

Stop the Beach, supra, 560 U.S. __, (slip op.) considered Fifth Amendment property Takings violation. Hurricanes caused erosion and local government applied for permits to "restore" beach areas. Notice of intent to award permits was challenged unsuccessfully by administrative process. Permits were approved. A State Court set aside approval, remanded to address unconstitutional taking questions, and certified the question of facial application constituting unconstitutional deprivation of property rights without just compensation. State Court found no violation, quashed remand and denied rehearing on Constitutional issues.

This Court addressing issues raised before state courts and the process of consideration, stated:

> . . .[W]here the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review. See *Brinkerhoff-*

> *Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 677-678 (1930). *Id.*, 560 U.S. __ (slip op., at 7).

Salvadors raised and preserved the issues at all levels, making their arguments far stronger. As part of the decision on takings issues, including regulatory claims, this Court stated, ". . .our doctrine of regulatory takings 'aims to identify regulatory actions that are functionally equivalent to the classic takings'." [citation omitted] *Id.*, (slip op., at 8). Identifying elements of a taking during the process, both by regulatory entities and courts:

> There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the exproprition. . . .It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. . . .[citation omitted]
>
> Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74 (1980), involved . . .California Supreme Court overruling one of its prior decisions. . .that the California Constitution's guarantees. . .did not require the owner of private property to accord those

> rights on his premises. The appellants. . .contended that their private property rights could not "be denied by invocation of a state constitutional provision or by *judicial reconstruction of a State's laws of private property*," *id.*, at 79. . . . We held that there had been no taking. . . .Our opinion addressed only the claimed taking by the constitutional provision. Its failure to speak separately to the claimed taking by "judicial reconstruction of a State's laws of private property" certainly does not suggest that a taking by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply. *Id.*, (slip op., at 8-9).

Yee v. *City of Escondido,* 503 U.S. 519, 112 S.Ct. 1522 (1992), considered Constitutionality of California ordinances regulating mobile home park property uses and restrictions. Establishing principles of construct-ion on compensation for governmental takings of real property, stating standards for two types of "takings" it found:

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. . . . But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property

> suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. . . . The first category of cases requires the courts to apply a clear rule; the second necessarily entails complex factual assessments of purpose and economic reflects of government actions. *Id.*, at 522-523

Facial challenges consider more than words of a statute; they must consider the framework of its application. Here actual physical occupation of Salvadors' property is more insidious than the norm; invasion of their property is carved out of regulatory process applied against Salvadors and Commission refusal to acknowledge and act on Salvadors' applications for regulatory relief. This "occupation" is devious. "Occupation" does not require continued, permanent physical entry on property; it requires eroding the "bundle of rights" of property ownership.

The *Yee*-challenged statute limited some property uses, but did not eliminate or restrict all uses. Salvadors held a preexisting grandfathered Permit and uses the Commission "revoked" by "supersession" Resolution 98-69 without notice or hearing, extinguishing all benefits, but continuing the duty to pay, effecting a total taking of Salvadors' property right. Commission discriminatory application of rules and regulations resulted in deprivation of Salvadors' rights constituting a Taking under the Fifth Amendment.

Identified types of takings in the *Yee* are:

> On their face, the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant. . . . [G]overnment may place ceilings on the rents the landlord can charge. . .or require the landowner to accept tenants he does not like, see, *e.g.*, *Heart of Atlanta Motel, Inc.* v. *Untied States,* 379 U.S. 241, 261(1964), without automatically having to pay compensation. . . . [A]nalyzed by engaging in the "essentially *ad hoc*, factual inquiries" necessary to determine whether a regulatory taking has occurred. *Kaiser Aetna, supra,* at 175. . . ."while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922). *Id.*, at 529.

That is what happened to Salvadors. Regulation of property arising out of statute and regulations went too far and require the "*ad hoc*, factual inquiries" required by *Yee.*

Yee examined "transfer of wealth" in context of constitutionally authorized zoning regulations in context of mobile home park property use regulation, restricting landowner property use within the statutory framework. It was found to not deny the owner all statutorily acceptable uses, but eliminated a use in which the property owner

had a preexisting vested right. *Yee* made factual inquiries and analysis stating:

> Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline, but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case, . . . but the existence of the transfer in itself does not convert regulation into physical invasion. *Id.*, at 529-530.

Yee held such determination could not be made solely from the face of the statute, but required analysis of facts. Here the statute and regulations must be viewed in the context of application to Salvadors *vis-á-vie* others regulated by the Commission. Salvadors sought State Court review of the facts from the outset, when Salvadors never were given any day in court on the issue of merits or liability. The only "hearing" given Salvadors was restricted to "mitigation", how much the Commission and Court decided to extract from Salvadors, not looking to "guilt" or "innocence", not considering Constitutional compliance. Factual analysis this Court requires never has been undertaken. The State confiscated Salvadors' property without any process, without opportunity

to be heard on Constitutional issues which Salvadors preserved at all stages.

Palazzolo v. *Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001), although finding Palazzolo was not denied all economic use of his property, held he was entitled to relief:

> The Takings Clause. . .prohibits the government from taking private property for public use without just compensation. . . . [E]ven a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs. *Id.*, at 617.

Salvadors attempted to comply with applicable regulations, but at no time waived their rights for judicial review.

> . . .[A] takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the land-owner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property,

> including the opportunity to grant any variances or waivers allowed by law. . . .until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. . . . Government authorities. . .may not burden property by imposition of repetitive or unfair landuse procedures in order to avoid a final decision. *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). *Id.*, at 620-621.

The Commission ignored Salvadors' entitlement to grandfathered permitting and property uses, disregarding the unique status of Salvadors' property and marina, Salvadors docks and fingers are on property titled in Salvadors, unlike virtually all other Lake George marinas which are on State-owned land requiring State permission. Salvadors' land ownership and dock placement predate Commission permitting; however, this Court's extension of Constitutional protections to post-statute, post-regulation acquisition, strengthening these arguments and Salvadors position.

> . . .[A] landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute, but instead is confined by limitations on the use of land which "inhere in the title itself.". . .
>
> . . .[R]egulation that otherwise would be unconstitutional absent compensation is not

> transformed into a background principle of the State's law by mere virtue of the passage of title. . . .("The 'total taking'. . .[requires] analysis of. . .the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities). . . . *Id.*, at 629-630.

Palazzolo stated, "He asserts. . .he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* 'by the simple expedient of leaving a landowner a few crumbs of value.'. . . " *Id.*, at 631. That argument is equally applicable here.

POINT VI
CONSTITUTIONAL PRINCIPLES AT ISSUE WARRANT REVIEW

Commission disregard of Constitutional principles and its method of action constitute a Taking without just compensation violating the Fifth Amendment, raising serious Constitutional issues concerning private property which only this Court can resolve and which this Court has not yet decided. Facts and procedural history of these cases create an appropriate platform from which this Court can assess, explain and address key private property issues. The State Court decisions present potentially devastating Constitutional pitfalls for private property rights. Expansion of precedents they set threatens to turn what should have been a relatively inconsequential (other than

to impacted parties) case involving one small family run business into exponentially growing sinkholes for and serious threat to property rights.

State Courts failure to acknowledge revocation of a preexisting permit State-issued by a State entity without notice of intent to revoke or hearing on revocation does not involve surrender of any rights is ludicrous. It shifts the balance of regulation, adding to the government side "essentially unfettered discretion", removing discretion tempered by Fifth Amendment, Equal Protection and Due Process safeguards. These cases set the precedent for sanctioning takings without compensation and without notice, without requiring government action of confiscation be preceded by Constitutionally acceptable procedure.

Denying Salvadors any hearing on DEC Permit revocation or on subsequent enforcement proceedings (#37573 and #45591), the Commission and State Courts usurped Fifth Amendment protections leaving property owners, Salvadors no avenue of defense or recourse. These State Court's decisions have the potential of destroying vested private property rights.

Both State Court decisions failed to consider Salvadors' arguments of denial of any hearing on revocation and the excessive fines and penalties assessed against Salvadors which flowed from the Commission's initial unauthorized and unconstitutional action or effective revocation of the DEC Permit. State Courts' failure created

government exactions. Even if Commission allegations of violations had withstood a merits hearing, which neither did since no hearing on any of the merits of either case ever was held, the fines and penalties exacted are exorbitant, grossly disproportional to alleged violations. This is particularly evident in the allegations of operating without a permit, the same non-Permit for which the Commission collected its annual fees from Salvadors. The same was true for the allegedly unpermitted 6-foot dock extensions for which the Commission also collected its annual linear foot fees and for which the Commission had entered into a Contract with Salvadors setting the chargeable length of those fees. Similarly, Commission charges about the "floating docks"-barges as expanding their operation, were proven not to give Salvadors even one additional berthing spot, significant since Salvadors' DEC permit was limited to the number of vessels allowed. Docking the barges at their marina actually reduced available berthing spaces, eliminating income producing spaces.

June 24, 1988, Commission employee Tracey Clothier prepared an Official Dock Survey Report which she executed for the Commission and by "J Salvador", creating a legally binding Contract. Appendix. In it the Commission identified Salvadors' commercial facility and acknowledged Salvadors' existing DEC Permit as continuing and as valid. It acknowledged Salvadors were authorized to have 67 slips, one mooring and boat

storage for twelve boats. The Commission's Contract set Salvadors' baseline Marina operations.

Even if the Commission's actions were found not to constitute a taking *per se*, the Commission still took Salvadors' property, the DEC Permit, without compensation, by unilaterally revoking it without notice or hearing, a result requiring review by this Court of Constitutional issues.

The Commission's action did not address any legitimate State concern. In #37573 Commission act-ions belied any concern about public safety, health or welfare, the only interest the Commission had in the attempted "revocation" of the DEC permit was to fine and penalize Salvadors. The purported "revocation" took place in September 1998. Enforcement action was not commenced until May 2000; then the Commission allowed it to remain "dormant" waiting for judicial action for approximately another year. The Commission continued to charge and collect both annual Permit fee (for what it claimed to have "revoked") and the full fees for the alleged "un-permitted" 6-foot dock extensions under its June 24, 1988, Contract with Salvadors. Had there been legitimate State concern or valid State interest the State was blatantly negligent in failure to pursue its own "enforcement" action, the Commission appeared unconcerned.

Commission action crossed the line in both cases. In #37573 Salvadors did not operate without a Permit at any time. Attempted "revocation" of

the preexisting DEC Permit without notice and without hearing was unconstitutional *ab initio*. That was followed by a series of Constitutionally defective proceedings, all of which can be summarized in the simple statement that Salvadors were denied any hearing on the merits in either case, denied the opportunity to confront witness against them, denied the opportunity to cross-examine those witnesses and denied the opportunity to even basic discovery. In #45591, Salvadors were denied any hearing on the underlying charges and given no discovery before summary judgment.

Commission actions quickly moved to the prohibited realm of government action and became exactions. Applying this appropriate standard, the Commission failed completely to meet its mandated burden.

POINT VII
COMMISSION AND STATE COURT ACTION EFFECTED AN UNCONSTITUTIONAL EXACTION

Justice Holmes opined, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."*Pennsylvania Coal, supra*, 260 U.S. at 415, aptly describing what occurred here. The Commission's fluid "rules" for Salvadors' matters are the type of regulation which "goes too far". Commission use of approval power as club to compel relinquishment preexisting property rights

established under Salvadors' DEC Permit setting the baseline of their marina operation for the future, is comparable to blackmail or extortion if engaged in by an individual. Commission actions dealing with Salvadors were arbitrary and capricious, an effective taking under *Dolan* v. *City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309 (1994), and under the more restrictive standards of *Agins* v. *City of Tiburo,* 447 U.S. 255, 100 S.Ct. 2138 (1980). Applying *Agins'* balancing test, the Commission failed to meet its burden, subjecting Salvadors to regulatory action which ". . .does not substantially advance legitimate state interests." *Agens, Id.* 260.

*Palazzolo, supra,*121 S.Ct. 2448 addressed a taking under the Fifth Amendment as applied to states through the Fourteenth Amendment and violation due process clause. Salvadors received no compensation for loss of value resulting from the Commission's unauthorized and unconstitutional regulatory takings, instead they were fined and penalized $689,000.00, with the Court not even properly computing the fine amount applying its own rationale.

The Commission's actions, particularly its flawed attempted "revocation" of Salvadors' DEC Permit was excessive. Its actions belie any argument that allowing Salvadors' DEC Permit to stand would be "injurious to the community", that simply is not true. Use of this subterfuge to confiscate private property without compensation to effect a Taking casts aspersion on valid

enforcement actions and legitimate measures for environmental protection.

The Commission lacked authority to proceed in as it did, rendering the DEC Permit "revocation" void *ab initio*. Citing a First Amendment case *Schneider* v *State,* 308 U.S. 147, 60 S.Ct. 146 (1939) this Court in *Metromedia, Inc* v *San Diego,* 453 U.S. 490, 101 S.Ct. 2882 (1981) stated:

> Mere legislative preferences or benefits respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. . . . [The] task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advances in support of the regulation of the free enjoyment of rights. . . . *Metromedia, Id.*, at 519-520.

Finding that ordinance too broad and unconstitutional, more than broad brush examination of challenged requirements was required, necessitating analytical study to determine if the prerequisite fails Constitutional muster. In such examination of Commission regulations as applied to Salvadors, the regulations fail Constitutional muster.

Salvadors did not argue that the Commission could not regulate marinas or impose restrictions,

limitations and conditions on such operations. They argued the Commission must have a rational basis for its demands which must bear a reasonable relation-ship to Commission-desired legitimate government ends. In that context such regulations still must be applied within the confines of Due Process and Equal Protection. The Commission had no valid rational basis, nor did it establish justification for its actions against Salvadors. Dealing with Salvadors the Com-mission ignored the limits on how far it could take imposition of restrictions and requirements. It disregarded the obligatory rational basis and guaranteed Equal Protection in application and the strictures of Due Process. The Commission deprived Salvadors of existing, vested, legally cognizable property rights, resulting in Commission extraction of property rights without compensation from Salvadors, an exaction without hearing.

CONCLUSION

The government actions taken against Salvadors go to heart of the insidious undermining of Constitutional rights through continuing subversion of the principles of individual rights and freedoms fostered by the Founding Fathers. For the reasons set forth herein, Petitioners, by undersigned counsel, under rules of this Court, request this Court issue a writ of *certiorari* to the New York State Court of Appeals.

Respectfully submitted,

Madeline Sheila Galvin
Counsel of Record
c/o Galvin and Morgan
217 Delaware Avenue
Delmar, NY 12054
(518) 439-7734